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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 284

DANIEL A. BENSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 285

GEORGE F. GLACY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 287

PATRICK B. MCGINNIS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 288

HENRY MERSEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

On Petitions for Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 284, pp. 22-31) is reported at 361 F. 2d 31.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1966 (Pet. No. 284, p. 33). Petitions for rehearing filed by petitioners McGinnis, Mersey and International were denied on June 10, 1966 (Pet. No. 287, p. 19a; Pet. No. 288, pp. 2, 12a-15a). The petitions for certiorari were filed in Nos. 284 and 285 on June 23, 1966, and in Nos. 287 and 288 on June 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioners' acts constituted willful misapplication of funds or property of a common carrier, in violation of 18 U.S.C. 660.

2. Whether the indictment adequately set forth the facts constituting the offense charged.

3. Whether the trial court correctly ruled that, in the circumstances of this case, the acts and statements of each defendant were admissible against all of them.

4. Whether the trial court properly admitted transcripts of telephone conversations that were recorded by one of the parties to the conversations.

STATUTES AND RULE INVOLVED

18 U.S.C. 660 provides in pertinent part:

> Whoever, being a president, director, officer, or manager of any firm, association, or corporation

> engaged in commerce as a common carrier * * * embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5000 or imprisoned not more than ten years, or both.
>
> * * * *

18 U.S.C. 2 provides in pertinent part:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> * * * *

47 U.S.C. 605 provides in pertinent part:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *.

Rule 7(c) of the Federal Rules of Criminal Procedure provides in pertinent part:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * *

STATEMENT

After a jury trial, petitioners Benson, Glacy and McGinnis were convicted of violating 18 U.S.C. 660

by willfully misapplying and converting property of the Boston and Maine Railroad ("B&M"), and petitioners Mersey and International Railway Equipment Corporation ("International") were convicted of the same offense as aiders and abettors under 18 U.S.C. 2.[1] McGinnis was the president, and Benson and Glacy were vice-presidents, of the B&M; Mersey was the president and sole stockholder of International, the corporate conduit through which the misapplication was accomplished. The misapplication involved the sale by the B&M of 10 railroad cars to Mersey for the unreasonably low price of $250,000; the immediate resale of the cars by Mersey for $425,000 to another carrier which already had indicated its willingness to pay that amount for them; and the payment by Mersey of $71,500 to McGinnis, Benson and Glacy. Each individual petitioner was sentenced to 18 months imprisonment; McGinnis, Benson and Glacy were each fined $5,000; and Mersey and International were each fined $2500 (R. 746-750, 752). The court of appeals unanimously affirmed (Pet. No. 284, pp. 22-31).

The facts, viewed most favorably to the government, are as follows:

In 1947 the B&M had purchased 10 stainless steel cars at approximately $85,000 each (R. 294). On April 30, 1958 Bugbee, a dealer in used railroad equip-

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[1] Another count of the indictment charged petitioners McGinnis, Benson and Glacy with violating Section 10 of the Clayton Act, 15 U.S.C. 20. The district court dismissed that count as not stating an offense, but this Court reversed. *United States* v. *Boston & Maine Railroad Co.*, 380 U.S. 157. During the trial the government dismissed that count (R. 109).

ment, visited Bolton, the railroad's director of purchases and stores, and expressed an interest in purchasing the cars (R. 94, 186).[2] When Bolton told him that the cars were not for sale because still in service, Bugbee insisted on seeing someone in higher authority. Bolton took Bugbee to Bolton's superior, Vice President Glacy, who refused to give Bugbee an option to purchase the cars at $50,000 each, on the grounds that they were still in service and that the railroad carried them on its books at $80,000—$90,000 (R. 94-95, 186-188).

On the day before Bugbee's visit, Vice President Benson (whose duties included determining what B&M cars were no longer needed, R. 118, 426, 555-556, 565, 567), had written Glacy a memorandum listing equipment available for retirement and sale, which did not include the 10 cars (GX 43, R. 803). Following Bugbee's visit, however, Benson requested the specifications on the 10 cars, and on the day after the visit the specifications were sent, apparently at Benson's direction, to Mersey (R. 174, 189-190, 531-535, 560, 593; GX 21, R. 773; GX 70, R. 816). Mersey also received Benson's personal copy of the memorandum, on which Mersey had written: "Add: (10-stainless steel coaches) (Not on list)" (R. 57-58, 98, 561-562; GX 21, R. 773). Ten days later Mersey called Bugbee (who did not know him) on the telephone, told Bugbee that he had the cars for sale, and offered to

[2] In the preceding year Bugbee had purchased from the B&M two dining cars that the railroad had acquired at the same time as the 10 cars. Bolton had handled that transaction "from beginning to end" (R. 89-94).

divide any resale profits in excess of $50,000 per car (R. 191). Bugbee then offered the cars to the Wabash Railroad ("Wabash") for $55,000 to $60,000 each (R. 193).[3]

In early June, Glacy told Bolton that a decision had been made to sell the 10 cars, that the sale would be handled exclusively by Mersey, and that Bolton was to do nothing further about it (R. 99-101). When Bolton asked why he would not handle the sale—that being his usual job—Glacy replied: "Mr. McGinnis wanted it handled in that manner" (R. 85-91, 99).

Late in June Bugbee told Mersey that the Wabash was "set on" a price of $50,000 per car (GX 80, R. 825).[4] A few days later Benson authorized Glacy to sell the cars for $30,000 each (GX 40, R. 797; GX 41, R. 799). On July 17, however, the Wabash persuaded Mersey to reduce the price to $42,500 (R. 195). The following day Glacy advised Benson that he had a firm offer at $250,000 (GX 39, R. 797) and Benson authorized the sale at that price (GX 38, R. 796).

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[3] Bugbee previously had resold to the Wabash Railroad the two dining cars he purchased from the B&M in 1957 (see note 2, *supra*), and McGinnis and Glacy knew that he had done so (R. 89-94; GX 58, R. 806).

[4] In the same telephone conversation Mersey related the substance of a conversation that he had had with McGinnis the preceding week. According to Mersey, McGinnis had expected him to handle the entire transaction, and was concerned because President Atkinson of the Wabash had been dealing directly with McGinnis. When Mersey assured McGinnis that he had the situation in hand, McGinnis replied, "Why in the hell would Atkinson want to come to me, then, if you are handling it?" (GX 80, R. 825).

On July 22, Glacy prepared a memorandum for the board of directors which stated that "Mr. Benson and I recommend that we accept the offer of $250,000," and that the Seaboard Air Line Railroad had been "practically ready" to buy the B&M cars, but instead had purchased similar equipment from the New York Central Railroad for $20,000—$22,000 per car (GX 42, R. 801-802). Seaboard had not been "practically ready" to buy the cars (R. 281), and the price it actually paid for similar equipment was $84,000 per car (R. 280-281, 287).

Glacy's memorandum was submitted through Benson's department to the clerk of the railroad for inclusion on the agenda of the board of directors' meeting scheduled for the next day (R. 314, 317-318, 323, 328; GX 42, R. 801-802). The normal practice was for the clerk to submit the agenda to the president to determine if any changes were necessary, and then to send it out a week in advance to the other directors for review (R. 314, 326). This was not done for the 10-car proposal, which was submitted to McGinnis by the clerk the day before the meeting (R. 323; GX 42, R. 801-802; GX 88, R. 841). As originally submitted to the clerk, the memorandum stated: "Mr. Benson and I recommend * * *" (R. 323; GX 42, R. 801-802). Prior to the meeting, however, it was revised to read "Management recommends * * *" (R. 325-326; GX 89, Schedule D, xeroxed), and McGinnis, upon seeing the revised memorandum, told the clerk that it was "satisfactory" (R. 326). On July 23 McGinnis presented the proposal to the board (R. 647), which unanimously approved it without discussion (R. 323;

GX 24, R. 778).[5] On the same day, Mersey gave Bugbee an option, valid until August 1, to purchase the cars for $450,000 (GX 79, R. 822-823). On August 1 a Wabash subsidiary agreed to purchase the cars from International for $425,000 (GX 33, R. 784-785).

Glacy executed a bill of sale for the 10 cars to International on August 14, 1958 (GX 24, R. 777). The next day, International reconveyed the cars to the Wabash subsidiary for $425,000 (GX 83, R. 833-834). International's check to the B&M for $250,000 was post-dated to August 22, 1958 (GX 22, R. 774). Although the B&M normally would require a certified check for that amount, Internation's check was not certified (R. 303; GX 22, R. 774).

During the four-month period (August 13-December 16) following the sale, McGinnis received $35,000, Benson $11,500 and Glacy $25,000—a total of $71,500—from International, in checks signed by Mersey (GX 1-A - 3C, R. 761-768).[5a]

At the trial, McGinnis, Benson and Glacy claimed that the payments were received in connection with

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[5] On the same agenda for the July 23 meeting were 28 other proposals for the sale of B&M real estate. In each of those other proposals, the recommendation actually presented to the board of directors at the meeting showed the names of both the purchaser and the B&M staff sponsor (GX 89 Scheds. A-1 through A-28).

[5a] As of August 14, International's bank balance was approximately $30,000, and it owed the B&M $75,500 (R. 308-309, 338; GX 87, R. 839). Between that date and December 16 its receipts, other than the proceeds from the sale of the cars and from the sale of parts for the cars, totalled $12,300 (R. 339; GX 91, Ex. I, R. 875-876; GX 34, sheets U-2602, CR-10 (xeroxed)).

other business transactions they had with International (R. 361, 378-381, 433, 577). McGinnis contended that he was paid $35,000 for arranging a prospective loan—one that never was made (R. 382-386, 399-400). He and Benson each admitted that the alleged services for International would have involved a conflict of interest between themselves and the B&M (R. 404, 611-614; Pet. No. 284, p. 10). The stubs for Benson's and McGinnis' checks from Internationel were marked "loans" (R. 568; DX R, R. 953; DX AA, R. 981). In their tax returns, McGinnis identified the payments as "director's fees" (not consulting fees, as he contended at trial, R. 385-387), and Glacy reported that he had received only $22,000, although his two checks during 1958 totalled $25,000 (R. 418, 458; DX S, R. 960). In 1962 interviews with an agent of the Interstate Commerce Commission, both McGinnis and Glacy denied having received any money from International during 1958 (R. 647, 651-652).

ARGUMENT

1. The court of appeals correctly held that petitioners' conduct violated 18 U.S.C. 660. That section makes it a crime for any officer of a common carrier willfully to misapply, or willfully to convert to his own or another's use, "any of the moneys * * * property, or assets of" the carrier. The evidence (see the Statement, *supra*) fully justified the jury in concluding that McGinnis, Benson and Glacy, the three top officers of the B&M, sold property of the carrier to Mersey for $250,000 (an unreasonably low price), on the understanding that he would resell it for $425,000 to another carrier already committed to

buying it at that price, and that he would remit to them a substantial portion of his profit. McGinnis, Benson and Glacy clearly violated their fiduciary obligation to the corporation and the latter could have compelled them to account for their derelictions. *Blum* v. *Fleishhacker*, 21 F. Supp. 527, 530-531 (N.D. Calif.), affirmed in part, reversed in part, 109 F. 2d 543 (C.A. 9), certiorari denied, 311 U.S. 665; 3 Fletcher, *Cyclopedia of Private Corporations*, § 884, at 284. By retaining $71,500 of the profits on the transaction—profits which belonged to the corporation and not to them—McGinnis, Benson and Glacy misapplied and converted to their own use property of the B&M, in violation of 18 U.S.C. 660.

Petitioners contend, however, that since the B&M parted with its title to the cars by selling them to International for $250,000, the $71,500 that McGinnis, Benson and Glacy received from Mersey out of his profits on the resale of the cars did not constitute property "of" the B&M. The applicability of the statutory prohibitions, however, does not turn upon such technical niceties of title. As noted, the B&M could have recovered the $71,500 from McGinnis, Benson and Glacy, and this gave it a sufficient property interest in the money to bring petitioners' conversion thereof within the statute.

Under 18 U.S.C. 656, which prohibits similar misapplications of corporate property by officers of national banks, it is well settled that the bank need not have title to the misapplied property for the officer to violate that statute by misapplication; it suffices that the bank's interest in or claim to the property is superior to the officer's. *Spencer* v. *United States*,

169 Fed. 562, 566-567 (C.A. 8); *United States* v. *Harter*, 116 F. 2d 51, 54-55 (C.A. 7); *Kramer* v. *United States*, 190 F. 2d 712, 717-718 (C.A. 4). Section 660 was modeled on Section 656 [6] and is intended to serve the same fundamental purpose of punishing misapplications of corporate property by corporate officers; there is accordingly no reason to give the former statute any narrower reach than the latter. If the B&M had sold the cars for $71,500 more than it did, and Mersey had paid that amount directly to McGinnis, Benson and Glacy, there could be no doubt that the latter would have misapplied or converted property "of" the B&M. The result should be no different merely because they sold the cars for the lower amount and thus avoided the appearance of directly converting the carrier's property, when in fact they committed the same breach of fiduciary obligation and made the same profit.

2. The court of appeals correctly ruled (Pet. No. 284, p. 26) that the indictment adequately set forth the facts constituting the offense with which petitioners were charged.

Paragraph 11 of the indictment charged that McGinnis, Benson and Glacy, by "carrying out a transaction pursuant to which * * * [10] coaches were sold to International for $250,000, willfully misappl[ied] * * * moneys * * * property and assets of the said

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[6] Section 660 was originally enacted as Section 9 of the Clayton Act, 38 Stat. 730 (1914). Senator Chilton, one of the sponsors of the legislation, explained that "This proposed statute was drawn practically from the banking statute as to embezzlement and willfully misapplying funds of the institution." 51 Cong. Rec. 14032. See, also, *id.*, at 14032-14035.

B&M * * *; and did willfully convert to their own use * * * [such] moneys * * * properties and assets * * * to wit, $71,500" (R. 18-19). Paragraph 12 and 13 described "the manner" in which they "effectuated" the "aforesaid violations" (R. 19). It summarized the facts set forth in the Statement, *supra*, and gave the details of the $71,500 payments that Mersey made to them (R. 19-20). Paragraph 13 concluded that the $71,500 "were derived almost entirely out of the proceeds from the resale by International of the said 10 coaches", and that "[u]pon the delivery of the aforesaid sums to defendants McGinnis, Glacy and Benson, the said defendants withheld the said moneys from the B&M, and retained them exclusively for their own account and use" (R. 20).

The indictment fully satisfied the requirement of Rule 7(c) of the Federal Rules of Criminal Procedure that it be "a plain, concise and definite written statement of the essential facts constituting the offense charged." It adequately informed petitioners that they were charged with conversion of the $71,500 rather than, as they suggest (Pet. No. 284, pp. 18; Pet. No. 285, pp. 4-5; Pet. No. 287, pp. 11-12), with conversion of the cars themselves. Thus, the indictment alleged that McGinnis, Benson and Glacy had misapplied property of the B&M through willfully converting to their own use the $71,500 they received from International, and that upon receipt of those sums they had "withheld the said moneys from the B&M, and retained them exclusively for their own account and use" (R. 20). That petitioners were adequately informed of the charge against them is further shown by the fact that at the trial McGinnis,

Benson and Glacy each took the stand and attempted to justify the payments received from International on the ground that they related to other transactions with that company. See *supra*, pp. 8-9.[7]

3. At the beginning of the trial, the court told the jury (R. 50-51) that in dealing with the admissibility of evidence against more than one defendant, it was "adopt[ing] a procedure here which will probably shorten the trial and avoid the necessity of attorneys constantly protecting their rights and properly protecting their rights." The procedure was that the government could offer evidence either against a particular defendant or generally; that if evidence was offered generally the court would rule against whom

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[7] There is nothing in *Russell* v. *United States*, 369 U.S. 749, upon which petitioners Benson and Glacy rely (Pet. No. 284, pp. 18-21; Pet. No. 285, pp. 4-5), which warrants invalidating the indictment. *Russell* involved a prosecution for contempt of Congress under 2 U.S.C. 192, growing out of a witness' failure to answer questions before a Congressional Committee. The statute penalizes a refusal to answer "any question pertinent to the question under inquiry." The Court held that since "the very core of criminality under 2 U.S.C. § 192 is pertinency to the subject under inquiry of the questions which the defendant refused to answer" (p. 764), the mere allegation of pertinency in the general words of the statute was insufficient "to sufficiently apprise the defendant 'of what he must be prepared to meet'" (*ibid.*); and that the indictment "must identify the subject which was under inquiry at the time of the defendant's * * * refusal to answer" (p. 754). In the present case, however, as shown in the text, the indictment did "sufficiently apprise the defendant 'of what he must be prepared to meet,'" and the defendants demonstrated by their defense that they were fully aware of what the charge against them was.

it was admissible; and that evidence offered against one defendant "may later on be tied up in some way that the government can offer it against one or more defendants" (*ibid*).

In accordance with this ruling, the government offered its evidence only against particular defendants, but at the conclusion of its case moved that "all evidence which has been received against any defendant * * * be received against all defendants on the ground that there has been ample showing of common plan or design" (R. 349). The court granted the motion (R. 350-351), and instructed the jury that "you may consider as some evidence—admissible evidence, according to my ruling—the acts or statements of one defendant to be used as against all the defendants" (R. 359). The court of appeals, after reviewing the evidence in detail (Pet. No. 284, pp. 26-30), held that "sufficient concert among [the defendants] was independently shown" (*id.* p. 26) to permit the jury to consider all the evidence against all the defendants.

That ruling, which turned upon the facts of this particular case, was correct, and there is no occasion for further review. As the court of appeals held, the evidence concededly admissible against each defendant individually also justified the inferences that the defendants had acted pursuant to a common plan and that, in furtherance of that plan, they had committed the acts and made the statements that the government proved. That was a sufficient showing to justify admitting the evidence against all of them. *United States* v. *Olweiss*, 138 F. 2d 198, 800 (C.A. 2), motion for leave to file a petition for writ of certiorari nunc pro tunc denied, 321 U.S. 744; *Williams* v. *United States*,

289 F. 2d 598, 601-602 (C.A. 9). Moreover, since such a common plan was shown the evidence was admissible against all the defendants even though there was no formal charge of conspiracy against them. *Lee Dip* v. *United States*, 92 F. 2d 802, 803 (C.A. 9), certiorari denied, 303 U.S. 638.

The record similarly refutes the contention (Pet. No. 284, p. 14-15; Pet. No. 288, p. 4) that, under the rule of *Kotteakos* v. *United States*, 328 U.S. 750, the government proved at most only that McGinnis, Benson and Glacy each engaged in a separate conspiracy with Mersey, but did not prove a single conspiracy among all of them. The Statement, *supra*, describes the closely interrelated roles the four individual defendants played in misapplying B&M property for their own personal advantage. In brief, Benson and Glacy made the misapplication possible by arranging for Mersey to handle the sale rather than Bolton, whose normal function was disposing of surplus property; they prepared the memorandum for the board of directors containing misstatements which made the sale at the low price of $250,000 appear advantageous to the B&M. McGinnis persuaded the directors to approve the sale on the basis of the misleading memorandum which had been changed to eliminate the disclosure that Benson and Glacy were the sponsors of the proposal. Glacy departed from the railroad's usual practice of requiring a certified check for a large transaction, and accepted a non-certified one that was post-dated eight days. Finally, after International had sold the cars at a substantial profit, McGinnis, Benson and Glacy each received a substantial

portion of that profit in checks of International signed by Mersey. As the court of appeals correctly concluded (Pet. No. 284, pp. 30-31):

> It was far too much of a coincidence, when events interlocked in the manner set forth, for the district court not to have been able to find that there was one conspiracy embracing all the defendants, rather than three isolated bilateral agreements.

4. Bugbee, one of the government's witnesses, customarily made recordings on disks of his business telephone conversations relating to prices, quotations, and sales and negotiations on equipment (R. 251). His secretary then transcribed the disks, which were thrown away, and he kept the transcripts in his office as part of his records (R. 252). He made such transcripts of two telephone conversations he had with Mersey in May and June 1958 (see pp. 5, 6 *supra*). On direct examination he testified about these conversations (R. 190-193, 198-204). On cross-examination defense counsel used the transcripts in an attempt to impeach him (R. 207-208). On re-direct examination the government offered the transcripts in evidence, and the court admitted them as records kept in the regular course of business (R. 252-253).

Petitioner Mersey contends (Pet. No. 288, pp. 6-9) that Section 605 of the Federal Communications Act (47 U.S.C. 605) barred the admission of the transcripts. That section prohibits the unauthorized interception, divulgence or publication of any telephone communication. In *Rathbun* v. *United States*, 355 U.S. 107, this Court held that the district court properly had admitted in a criminal trial testimony as to

what a police officer overheard while listening to a conversation on an ordinary telephone extension in another room, with the consent of one party to the conversation. The Court stated (p. 111, emphasis in original):

> * * *Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. Consequently, one element of Section 605, *interception*, has not occurred.

In the present case the recording of the conversation by Bugbee and its subsequent transcription by his secretary similarly did not constitute an "interception" of the communication within the meaning of Section 605. *Rathbun* makes it clear that there would have been no violation if, instead of using a recording device, Bugbee had had his secretary listen to the conversation. The fact that Bugbee made a recording which his secretary transcribed does not warrant a different result. Cf. *Lopez* v. *United States*, 373 U.S. 427. Indeed, in *Rathbun* the Court stated (355 U.S. at 110):

> It has been conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it.

Where, as here, a recording is made by attaching a device to the telephone by or with the consent of one of the parties to the conversation, Section 605 has not been violated. *United States* v. *Yee Ping Jong*, 26 F.

Supp. 69, 70 (W.D. Pa.); *Carnes* v. *United States*, 295 F. 2d 598, 602 (C.A. 5), certiorari denied, 369 U.S. 861; *Wilson* v. *United States*, 316 F. 2d 212, 213 (C.A. 9). The contrary district court decision in *United States* v. *Stephenson*, 121 F. Supp. 274 (D.D.C.), appeal dismissed, 223 F. 2d 336 (C.A. D.C.), upon which petitioner Mersey relies (Pet. No. 288, p. 8), was in effect nullified by *Rathbun*.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

HOWARD E. SHAPIRO,
JOHN H. DOUGHERTY,
RICHARD A. WEGMAN,
Attorneys.

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PATRICK B. McGINNIS,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

REPLY BRIEF FOR THE PETITIONER PATRICK B. McGINNIS

WILLIAM T. GRIFFIN
LAWRENCE R. COHEN
Counsel for Petitioner
ELEVENTH FLOOR
19 Congress Street
Boston, Mass. 02109

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REPLY BRIEF FOR THE PETITIONER PATRICK B. McGINNIS

I. CORRECTIONS OF FACTUAL STATEMENTS IN THE BRIEF FOR THE UNITED STATES OF AMERICA.

The petitioner feels that it is incumbent upon him to call to the Court's attention a number of factual statements in the Government's brief which are either misleading or incorrect. (Page references are to the Government's brief unless otherwise indicated.)

1. On page 4, commencing on the tenth line, the brief states that the "misapplication involved the sale by the B & M of 10 railroad cars to Mersey for the unreasonably low price of $250,000; . . . ." As for the statement that